Supreme Court, U.S.
FILED

No. _____

06-836 DEC 13 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

LIGIA PACHECO DE PEREZ and
CRUZ SIGALA, *et al.*,

Petitioners,

versus

AT&T CORP., RODERICK MARSHALL,
PAUL EDMUNDS, RONALD MCCARTHY,
and ABIGAIL SULLIVAN,

Respondents.

**On Petition For A Writ Of Certiorari
To The State Court Of Fulton County,
State Of Georgia**

PETITION FOR A WRIT OF CERTIORARI

FRANK C. DUDENHEFER, JR.
Counsel of Record
JOHN J. CUMMINGS, III
CUMMINGS, CUMMINGS
& DUDENHEFER
416 Gravier Street
New Orleans, Louisiana 70130
Telephone: (504) 586-0000

RICHARD M. MARTIN, JR.
20 Versailles Boulevard
New Orleans, Louisiana 70125
Telephone: (504) 586-0000

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Supreme Court of Georgia, in finding that the "access to the courts" provisions of O.C.G.A. §§ 1-2-10 and 1-2-11 apply only to citizens of foreign countries who reside within the United States and do not extend to nonresident aliens, ruled in contravention of Article 13 of the Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, 8 Stat. 466 (1836) insofar as Article 13 grants to citizens of Venezuela unrestricted access to the courts of the United States.

PARTIES TO THE PROCEEDING

The appellees in the Supreme Court of Georgia (plaintiffs in the district court) in *Ligia Pacheco de Perez, et al. v. AT&T Corp., et al.* were:

Elias Acosta

Renny Antonio Vasquez Alfonzo

Francisco Alvarez Alonzo

Soraya Aponte

Carmen Mercedes Armas

Jesus Albert Armas

Devanira Azocar

Gloria de Baptista

Felix Cabriles

Mercedes de Cartegena

Gregorio Castillo

Edilsa Castro

Onofre Castro

Jesus Colmenares

Juana E. de Contreras

Alberto Jose Galeno Criss

Jorge Antonio Cuevara

Fernando Delgado

Antonio Jose Duarte

PARTIES TO THE PROCEEDING – Continued

Aberto Espina

Ana Olga Ferreira

Eudi Frietes

Albert Jose Galeno

Eduardo Gonzalez

Maria J. Gonzalez

Omar Gonzalez

Tomas Gonzalez

Carmen Blanco de Guevara

Niera Quamina de Herrera

Monica Hournug

Liebana Liendo

Orsilio Liendo

Amilcar de los Santos Alfonzo Lopez

Isaac Lugo

Luis Felipe Martinez

Miguelina de Martinez

Miguel Astrubal Arcia Montezuma

Gustavo Adolfo Palma

Edgar Perdomo

Julio Euclides Coronado Perez

Ligia Pacheco de Perez

PARTIES TO THE PROCEEDING – Continued

Rosa Quintana

Henry Rada

Rosa Rada de Ramirez

Wenceslao Ramirez

Marisol Veloz Relsolelo

Ana Cecilia Contreras de Rodriguez

Rafaela Rodriguez

Amibal Salgado

Pedro Rafael Sanchez

Ormica Evangelina Santos

Ovidio Simon

Jose Angel Solorzano

Narsisco Solorzano

Edita Sumoza

Scarlet de Torres

Angela de Vargas

Maria Vargas

Carmen R. Zanelli

The appellees in the Supreme Court of Georgia (plaintiffs in the district court) in *Cruz Sigala, et al. v. AT&T Corp., et al* were:

Cruz Sigala

Norma Sofia de Sigala

PARTIES TO THE PROCEEDING – Continued

The appellants in the Supreme Court of Georgia (defendants in the district court) were:

AT&T Corp.

Charles Argy

Joe Carbone

Tom Curtain

Paul M. Edmunds

Roderick Marshall

Ronald McCarthy

Ralph Pearson

William Shinnick

Abigail Sullivan

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
TREATY PROVISIONS INVOLVED	2
GEORGIA STATUTORY PROVISIONS INVOLVED	3
VENEZUELA CIVIL CODE PROVISION INVOLVED	4
STATEMENT	4
REASONS FOR SEEKING REVIEW	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES:

Amalya v. Stanolind Oil & Gas Co., 158 F.2d 554 (5th Cir.1946), *cert. denied*, 331 U.S. 808 (1947)..... 10

AT&T Corp., et al. v. Cruz Sigala, et al., 274 Ga. 137, 549 S.E.2d 373 (Ga. 2001)..... 1

Atlantic Coast Line v. Wiggins, 49 S.E.2d 909 (Ga.App.1948)..... 9

Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947)..... 10

Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed.2d 1255 (1955)..... 6, 7

TREATIES:

Article 13, Treaty of Peace, Friendship, Navigation and Commeree between the United States and Venezuela, 8 Stat. 466 (1836)..... 2, 6, 8, 10, 11

FEDERAL STATUTES:

28 U.S.C. § 1257(a)..... 2

GEORGIA STATUTES:

O.C.G.A. § 1-2-10..... 3, 7, 9, 10

O.C.G.A. § 1-2-11(b)..... 3, 7, 9, 10

Georgia Constitution, 2-104 art. 1, § 1, par. 4..... 4

VENEZUELA CODE OF CIVIL PROCEDURE:

Article 1..... 4, 8

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Cruz Sigala, *et al.* and Ligia Pacheco de Perez *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The Georgia Court of Appeals' Order denying Plaintiffs' Petition for Certiorari to The State Court of Fulton County, Georgia. It is reproduced at App. 1.

The State Court of Fulton County, Georgia, Order granting Defendants' motion to dismiss for forum non conveniens. It is reproduced at App. 2.

The Supreme Court of Georgia's July 26, 2001 Order denying Plaintiffs' Motion for Reconsideration in *AT&T Corp., et al. v. Cruz Sigala, et al.* It is reproduced at App. 13.

The Supreme Court of Georgia's July 26, 2001 Order denying Plaintiffs' Motion for Reconsideration in *AT&T Corp., et al. v. Ligia Pacheco de Perez, et al.* It is reproduced at App. 14.

The Supreme Court of Georgia's July 16, 2001 opinion in *AT&T Corp., et al. v. Cruz Sigala, et al.* and *AT&T Corp., et al. v. Ligia Pacheco de Perez, et al.*, is reported at 274 Ga. 137, 549 S.E.2d 373 (Ga. 2001). It is reproduced at App. 15.

The Supreme Court of Georgia's January 28, 2000 Order granting Petition for Certiorari. It is reproduced at App. 30.

The Georgia Court of Appeals' September 2, 1999 Order denying Defendants application for an interlocutory appeal. It is reproduced at App. 32.

The State Court of Fulton County, Georgia, July 20, 1999 Order denying Defendants motion to dismiss for *forum non conveniens*. It is reproduced at App. 34.

The Supreme Court of Georgia's September 18, 2006 Order denying Plaintiffs' Petition for Certiorari to The Georgia Court of Appeals. It is reproduced at App. 41.

JURISDICTION

The Supreme Court of Georgia issued its opinion on July 16, 2001. Petitioners filed a Motion for Reconsideration which was denied on July 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) because that opinion implicates, and deprives Petitioners, of "access to the courts" rights and privileges conferred under the 1836 Friendship Treaty between the United States and Venezuela.

TREATY PROVISIONS INVOLVED

Article 13, Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, 8 Stat. 466 (1836):

Both the contracting parties promise and engage, formally, to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of

the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country in which they may be; for which they may employ in defence of their rights such advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their trials at law; and such citizens and agents shall have free opportunity to be present at the decisions and sentences of the tribunals, in all cases which may concern them; and likewise at the taking of all examinations and evidence which may be exhibited on the said trials.

GEORGIA STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 1-2-10:

The citizens of other states of the United States or of foreign states at peace with this state shall by comity, be allowed the privilege of suing in the courts of this state and of giving evidence therein, as long as the same comity is extended in the courts of the other states to the citizens of this state.

O.C.G.A. § 1-2-11(b):

(b) Aliens who are subjects of governments at peace with the United States and this state, as long as their governments remain at peace with the United States and this state, shall be entitled to all the rights of citizens of other states who are temporarily in this state. . . .

Georgia Constitution, 2-104 art. 1, § 1, par. 4:

No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both.

VENEZUELA CIVIL CODE PROVISION INVOLVED

Article 1 of the Venezuelan Code of Civil Procedure:

The judges have the obligation to administer justice to Venezuelans and foreigners alike, to the extent that the laws determine their jurisdiction to deal with the respective subject.

STATEMENT

Petitioners, Cruz Sigala and Ligia Pacheco de Perez, are the Venezuelan citizens who have brought suit in Georgia against Georgia resident, U.S. citizen tortfeasors on behalf of persons injured or killed as the result of a fire and explosion which occurred on September 28, 1993 at Las Tijeras, Republic of Venezuela, when a rotoexcavator digging a burial trench for a fiber optic telephone cable struck an underground natural gas pipeline causing it to rupture and explode. The construction project, including supervision, construction methods (*e.g.*, selection and use of the rotoexcavator), cable route surveys, cable route site selection, permit acquisitions, all pricing issues, etc., were conceived, designed, conducted, implemented, and/or supervised by AT&T Corp. and its Georgia citizen employees who are named defendants in this case (*i.e.*, Roderick

Marshall, Paul Edmunds, Ronald McCarthy and Abigail Sullivan).

The activities directly causing the deaths and injuries were negligently undertaken by Georgia citizens and were controlled and directed by AT&T Corp. from the Atlanta, Georgia, area. Suit was filed by Petitioners in the State Court of Fulton County, Georgia, which is in the home county of several of the employee defendants.

Because no Georgia statute then authorized dismissal of any case for *forum non conveniens,* the State Court of Fulton County, Georgia (the trial court) on July 20, 1999 denied the motion of AT&T Corp. and its employee defendants to dismiss the case. On March 21, 2000, the Georgia Court of Appeals summarily affirmed the district court. In response to a petition for *certiorari*, the Supreme Court of Georgia granted review on this specific issue:

> Does a Georgia trial court have the inherent authority to dismiss, under doctrine of *forum non conveniens*, a lawsuit brought by nonresident aliens for injuries occurring on foreign soil?

Following submission of briefs and oral argument by counsel, the Supreme Court of Georgia, on July 16, 2001, reversed the Georgia Court of Appeals and the district court, finding that Georgia's district courts do have inherent, non-statutory authority to dismiss for *forum non conveniens*. On July 23, 2001, Petitioners sought reconsideration of the July 16, 2001 opinion, which the Supreme Court of Georgia denied in its Order of July 26, 2001.

REASONS FOR SEEKING REVIEW

The Supreme Court of Georgia, contrary to the "access to court" provisions contained in Article 13, Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, 8 Stat. 466 (1836), has barred Petitioners' access to the courts of Georgia because they are non-resident aliens. In issuing an opinion which disregards the Treaty and discriminates against non-resident alien plaintiffs, the Supreme Court of Georgia relied upon the U.S. Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S.Ct. 936, 94 L.Ed.2d 1255 (1955). However, *Johnson*, was a *habeas corpus* case involving an alien prisoner of war captured and detained outside of the United States, and was not a case where citizens of a nation at peace with the United States seek to vindicate their rights in the home forum of U.S. citizen tortfeasors.

Confusing the issue of constitutional rights with the issue of treaty-based court access, the Supreme Court of Georgia held that:

> ". . . it is the alien's presence within the territorial jurisdiction of the United States that gives the judiciary the power to extend constitutional protections beyond citizens to aliens. Given the importance of an alien's presence as a resident within this country to invoke the rights guaranteed to citizens, we conclude that OCGA §§ 1-2-10 and 1-2-11 apply to citizens of foreign countries who are residing within the United States and do not extend to nonresident aliens."

Eisentrager is a World War II era case which concerned a *habeas corpus* proceeding by Lothar Eisentrager, a German national. Eisentrager was imprisoned by the

U.S. Army in Germany following his conviction of having engaged in military activity against the United States [in China] after Germany had surrendered in 1945. The U.S. Supreme Court, in an opinion by Justice Jackson, held that Eisentrager had no right to a writ of *habeas corpus* to test the legality of his post-conviction detention:

> We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.

Id., 339 U.S. at 785, 70 S.Ct. at 947.

In the instant case, the Petitioner citizens of Venezuela, a nation always at peace with the United States, seek civil damages in the home forum of the defendant U.S. citizen tortfeasors. In seeking such redress, Petitioners relied upon O.C.G.A. §§ 1-2-10 and 1-2-11(b) which clearly provide for their access to the courts of Georgia. § 1-2-10 provides:

> The citizens of other states of the United States or of foreign states at peace with this state shall by comity, be allowed the privilege of suing in the courts of this state and of giving evidence therein, as long as the same comity is extended in the courts of the other states to the citizens of this state.

Similarly, § 1-2-11(b) provides:

> (b) Aliens who are subjects of governments at peace with the United States and this state, as long as their governments remain at peace with the United States and this state, shall be entitled

> to all the rights of citizens of other states who are temporarily in this state. . . .

This access to the courts of Georgia is reciprocated by Article 1 of the Venezuelan Code of Civil Procedure which provides:

> The judges have the obligation to administer justice to Venezuelans and foreigners alike, to the extent that the laws determine their jurisdiction to deal with the respective subject.

Petitioners suggest that the above provisions of Georgia and Venezuela law are in conformity with Article 13, Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, 8 Stat. 466 (1836). Article 13 provides:

> Both the contracting parties promise and engage, formally, to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country in which they may be; for which they may employ in defence of their rights such advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their trials at law; and such citizens and agents shall have free opportunity to be present at the decisions and sentences of the tribunals, in all cases which may concern them; and likewise at the taking of all examinations and evidence which may be exhibited on the said trials.

Nowhere does O.C.G.A. § 1-2-10 say that "the privilege of suing in the courts of this state and of giving evidence therein" is [surprise!] conditioned upon physical presence in Georgia. The only qualification imposed upon aliens by O.C.G.A. § 1-2-11(b) is that their government be at peace with the United States and with Georgia. Because this statute does not require aliens to live in Georgia as a precondition of court access, but only to be citizens of a country "at peace" with the United States, Petitioners were greatly surprised to learn that the Supreme Court of Georgia had geographically excluded them access to justice against local Georgia tortfeasors.

This surprise exclusion is not only at odds with Georgia statutory law, it is also at odds with the 1836 Treaty between the United States and Venezuela which provides access to the courts for transient or resident aliens. Here, Petitioners, through U.S. counsel, have submitted themselves to the jurisdiction of the courts of Georgia and are "transients."[1] Thus, the Supreme Court of Georgia's recent opinion is contrary to the Treaty and, in

---

[1] In *Atlantic Coast Line v. Wiggins*, 49 S.E.2d 909, 911 (Ga.App.1948) where, after a defendant filed a plea of *forum non conveniens*, the question presented on appeal was "*whether a Georgia court has the discretion to decline jurisdiction of a transitory action in tort when it would be more convenient and less expensive for the defendant if the case was instituted and tried in the state and county where the alleged tort occurred.*" In deciding the issue, the *Wiggins* court, 49 S.E.2d at 911, held:

> Whatever may be the rule in the Federal courts or in other states, we think our Constitution controls. Code section 2-104 art. 1, § 1, par. 4, provides "*No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both.*"

effect, is a "judicially legislated" reduction to its intended scope.

Petitioners suggest that the Supreme Court of Georgia has no authority, whether intended or not, to reach a result which reduces the scope of Article 13 of the *federal* friendship treaty existing between the United States and Venezuela. When the Supreme Court of Georgia wrote that " . . . O.C.G.A. §§ 1-2-10 and 1-2-11 apply to citizens of foreign countries who are residing within the United States and do not extend to nonresident aliens," it ran afoul of the Treaty which does not so limit court access.

The Treaties of the United States are the "Supreme Law of the Land," coeval with Federal Statutes and the Constitution. *Amalya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir.1946), *cert. denied*, 331 U.S. 808 (1947); U.S. Constitution, Article IV, cl. 2. Determining the scope of treaties is the sole province of the federal government because Article VI, Clause 2 of the United States Constitution, provides that *"all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land."* Treaties predominate over local law. *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947). The Supreme Court of Georgia's restrictive interpretation of the court access provisions of O.C.G.A. §§ 1-2-10 and 1-2-11(b) is "local law" which is subservient to the express language of the 1836 Friendship Treaty. Further, "local" restriction of that Treaty's court access provision is improper because the power to change treaties is constitutionally vested in the federal executive and legislative branches, not in the courts of the fifty states.

The Supreme Court of Georgia has no authority, albeit unintentionally, to restrict court access to citizens of

"friendly" foreign nations where such access is provided in a federal treaty. Thus, the Supreme Court of Georgia should be reversed on the ground that it does not have the legal authority to restrict the scope of Article 13 of the 1836 Friendship Treaty.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

FRANK C. DUDENHEFER, JR.
Counsel of Record
JOHN J. CUMMINGS, III
CUMMINGS, CUMMINGS & DUDENHEFER
416 Gravier Street
New Orleans, Louisiana 70130
Telephone: (504) 586-0000

RICHARD M. MARTIN, JR.
20 Versailles Boulevard
New Orleans, Louisiana 70125
Telephone: (504) 586-0000

Counsel for Petitioners

FIRST DIVISION
ANDREWS, P. J.,
PHIPPS and MIKELL, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002) http://www. gaappeals.us/rules/

March 24, 2006

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A05A1919.PEREZ et al. v. AT&T CORP. et al.

PHIPPS, Judge.

In this case, the following circumstances exist and are dispositive of the appeal:

(1) The evidence supports the judgment; and

(2) The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.

The judgment of the court below therefore is affirmed in accordance with Court of Appeals Rule 36.

Judgment affirmed. Andrews, P. J., and Mikell, J., concur.

THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

LIGIA PACHECO DE PEREZ, et al., Plaintiffs, v. AT&T COMPANY, et al., Defendants,	)	CIVIL ACTION FILE 95 VS 0104492
CRUZ SIGALA, et al., Plaintiffs v. AT&T COMPANY, et al, Defendants	)	CIVIL ACTION FILE 95 VS 0104493

ORDER

(Filed Feb. 11, 2004)

The above styled action came regularly before the Court and was heard on Defendant's *Motion To Dismiss for Forum Non Conveniens.* All parties were represented by counsel. After considering the entire record, the Court hereby issues the following Order:

In the present motion the Court revisits the issue of whether jurisdiction should be declined in favor of the Courts of Venezuela under the doctrine of forum non conveniens. As recited in this Court's prior Order, the present action arises from a gas pipeline explosion which occurred during the excavation of a trench for the installation of a fiber-optic cable in Tejerias, Venezuela. Previously, this

Court denied Defendant's motion on this ground as Georgia did not, at that time, recognize the doctrine of forum non conveniens and a Georgia trial court was therefore without the authority to dismiss an action where jurisdiction and venue were otherwise proper. The Georgia Supreme Court subsequently recognized the doctrine on appeal, See *AT&T Corporation et al. v. Sigala et al. AT&T Corporation, et al. v. Perez et al.*, 274 Ga. 137; 549 S.E.2d 373 (2001), and this issue returns to this Court, after allowing limited discovery, for an explicit ruling on whether this discretionary doctrine is appropriately exercised here.

The doctrine of forum non conveniens permits a trial Court to dismiss an action over which it would ordinarily would have jurisdiction "if it serves the convenience of the parties and the ends of justice." *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799 (7th Cir. 1997).

As summarized in the opinion of the Georgia Supreme Court:

> The common-law doctrine of forum non conveniens is an equitable principle by which "a court having jurisdiction may decline to exercise it on considerations of convenience, efficiency, and justice." Under federal case law, a district court has the discretion to dismiss a lawsuit when there is an adequate alternative forum in a foreign court and dismissal best serves the convenience of the parties and the ends of justice. The U.S. Supreme Court has identified relevant public and private interests to be considered in determining whether the plaintiffs choice of forum should be honored. The private interests include the relative ease of access to sources of proof, the relative availability of compulsory process to secure the attendance of witnesses, the cost of obtaining

> willing witnesses, the need to view the premises, the ability to enforce judgments, and other factors that make a trial expeditious and inexpensive. When courts are required to adjudicate disputes that have little connection to the chosen forum, the public interest factors include issues involving court congestion, jury duty, and choice of law. *AT&T Corporation et al. v. Sigala et al. AT&T Corporation, et al. v. Perez et al.*, 274 Ga. 137; 549 S.E.2d 373 (2001)

In this Court's prior Order of July 26, 1999, the various public and private factors applicable to a forum non conveniens analysis were weighed and found to favor dismissal. As these same factors continue to favor dismissal, the Court is disinclined to disturb the prior analysis and findings which are hereby incorporated and adopted here. What remains for determination is the threshold issue of whether Venezuela, as the transferee jurisdiction, is an available and adequate forum. While this Court previously declined to characterize the civil courts of Venezuela as inadequate, that finding was necessarily temporal. What follows is this Court's determination of the current adequacy of the Venezuelan civil judicial system after considering the factual submissions of the parties on this issue.

The determination of whether an adequate alternate forum exists involves a two part inquiry of "availability and "adequacy." It is Defendant's burden to demonstrate both. A forum is "available" if all parties are amenable to process and are within the forum's jurisdiction. The alternative forum is "adequate" if the parties will not be deprived of all remedies or treated unfairly. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Kamel v. Hill-Rom Co. et al.*, 108 F.3d 799 (1997).

According to the affidavit of Mr. Francisco Lopez-Herrera, a Venezuelan attorney with twenty-five years experience, the courts of Venezuela are "available" and recognize the cause of action alleged within Plaintiff's Complaint here. Additionally, Victor Hugo Guerra Hernandez, also a Venezuelan attorney, contends in his affidavit that while no bi-lateral international treaty between the United States and Venezuela governs jurisdiction, jurisdiction may be asserted pursuant to the general rule Article 39 of Venezuela's Private International Law of 1998 ("VPIL"). Article 39 provides:

> In addition to the jurisdiction that the law assigns to Venezuelan tribunals in trials against persons domiciled in Venezuela, the tribunals of Venezuela shall have jurisdiction over trials brought against persons domiciled abroad in the situations contemplated in Articles 40, 41 and 42 of this law.

Of articles 40-42, Defendants contend that jurisdiction may be asserted over non-residents under Article 40 which provides:

> Venezuelan tribunals shall have jurisdiction to hear trials of actions seeking the collection of damages:
>
> (1) When the actions deal with the disposition or possession of movable or immovable assets located in Venezuela;
> (2) *When the actions deal with obligations that must be executed in Venezuela or that derive from contracts entered into or facts occurred in Venezuela;*
> (3) When the defendant has been personally served in Venezuela;

(4) When the parties submit, expressly or tacitly, to the jurisdiction of Venezuelan courts.

Particularly, Defendants contend that Plaintiffs' claims may be brought under the phrase conferring jurisdiction in subsection (2) where "facts occurred in Venezuela." While Defendants cite to no previous instances, it is opinion of Mr. Guerra Hernandez that the present incident would vest jurisdiction in Venezuelan courts. (Affidavit ¶ 17). Mr. Hernandez also contends that jurisdiction may be asserted under VPIL Article 47, which governs a cause of action when products produce damages.

Additionally, according to the affidavit submitted by Defendant, since Plaintiffs are "domiciled" in Venezuela (See Second Declaration of Lopez-Herrera), they may bring suit without posting of bond and, most significantly, Defendants have consented to jurisdiction of Venezuelan Courts and have agreed to waive operation of a ten year statute of proscription. (Defendant's Brief, page 18). The Court finds that Defendants have met their burden in demonstrating availability of the forum.

Considering the issue of "adequacy," Defendants must demonstrate that the relevant type of case is cognizable in theory even in the absence of reference to any actual cases of the type. *In re Bridgestone, Inc., et al.*, 190 F. Supp. 2d 1125 (2002) citing *Macedo v. Boeing Co.*, 693 F. 2d 683 (7th Cir. 1982).

As to the adequacy of the remedies available in the alternative forum, it is insufficient to show that the available remedies are less generous in the transferee forum. Defendant need only demonstrate that the remedies available are not so unsatisfactory to constitute no remedy at all. Piper Aircraft, 454 U.S. 235 (1981); *Sigalas*

v. Lido Maritime, Inc., et al., 776 F2d 1512 (11th Cir. 1985).

On this issue, since Plaintiffs contend that the pending criminal action arising from these facts must be concluded prior to the commencement of any civil action, and the criminal prosecution has been pending for over ten years, the Court requested that the parties submit additional briefs addressed to the narrow issues of: (1) the current status of the criminal investigation; and (2) the source of the Venezuelan statutory or other governing authority that requires the completion of a criminal investigation prior to the progression of any civil action.

In their response, Plaintiffs have submitted the affidavit of Kenny Migneco, a registered lawyer in Venezuela. Mr. Migneco refers the Court to Articles 51 and 442 of the Venezuelan Organic Code of Criminal Prosecution which provide:

> The civil action will be practiced, according to the rules established by this Code, after the criminal sentence is final, without prejudice to the victims' rights to sue before the civil jurisdiction.
>
> When the condemnatory sentence is definite and final, those persons legitimated to practice the civil actions may sue before the Judge or President of the Court that sentenced to make amends for the damages and indemnification of prejudice.

Plaintiffs also contend that the political situation existing in Venezuela has deteriorated during the Chavez administration and that the judiciary has become less independent, more corrupt, and less efficient.

While Plaintiffs interpret the above authority to mean that a civil trial cannot commence until the criminal action is final and the absence of several defendants renders the criminal action an interminable proceeding, Defendant contends that a civil action may commence and proceed while the criminal action is outstanding.

In support of their interpretation of Venezuelan law, Defendant filed the affidavit of Pedro Alberto Riera. Mr. Riera graduated from Andres Bello Catholic University in 1983, became a registered member of the bar, and currently leads a litigation team in the firm in which he is a partner. According to Mr. Riera, the criminal prosecution remains currently pending after ten years with no definitive ruling as to the guilt or innocence of the persons tried in the criminal matter. However, if a suit is filed under the Code of Civil Procedure in a civil court, rather than the criminal tribunal that presided over the prosecution of the matter, the civil action may be filed and proceed through all of its phases until the point of ruling on the merits.[1] Prior to disposition of the legal merits, the civil action must be suspended until a final order on the criminal

---

[1] Mr. Riera cites to Articles 47 and 415 of Organic Code of Criminal Prosecution. These Articles provide:

> Article 47, Prosecution. The civil action shall be prosecuted in accordance with the rules set forth in this Code, after the final judgment has been entered, without prejudice to the right of the victim to bring suit in the civil jurisdiction.
>
> Article 415, Legal Basis, Once the final guilty verdict has been entered, those persons who have the legal right to bring the civil action may file suit for trial before a judge of the court, or the panel of judges of the court that ruled on the sentence, the damages recovery, and the compensation for losses.

proceedings is issued. Then, Mr. Riera adds a rather significant qualification:

> Nevertheless, in the matter at hand, there are very sound elements of judgment which would allow one to conclude that, in principle, said matter precedent could be denied, inasmuch as more than 10 years have passed since the accident occurred and as of this time there has been no final judgment with regard to the guilt or innocence of the persons who were the subject of the criminal investigation . . . .
>
> If the supreme court does not issue a firm decision with regard to the guilt or criminal negligence of the subjects of the investigation, this could serve as the basis for the civil court's denial of the matter precedent, given that, otherwise, the civil trial could go on indefinitely, which would be contrary to or violate the principle of effective judicial protection and the right to a speedy trial and verdict. (Riera affidavit, p. 2-3)

In determining the issue here, the Court's task is made more obscure since it is informed only by interpretations of a code legal system by practitioners without the guide of established precedent. However, considering the matters of record, the Court does not equate the limitations of the alternative forum to inadequacy provided that the action may be filed and progress toward resolution within a reasonable time. What remains troubling, however, is the continued criminal prosecution that remains outstanding after ten years, Therefore, in light of all the foregoing, the Court will provisionally GRANT the motion of Defendant on the following conditions:

(1) That Defendant consents to the jurisdiction of Venezuela and will not challenge Plaintiff's capacity to sue in its courts;

(2) That Defendant will not raise any statute of limitation applicable under the laws of Venezuela or the State of Georgia;

(3) That Defendant produce in the Venezuelan action representatives and documents under their control, subject to privileges applicable only under Venezuelan law;

(4) That Defendant agree to not collaterally attack any judgment rendered in a Venezuelan Court;

(5) That if the action commenced in Venezuela, to be filed by Plaintiffs within the next six months, does not progress to the "second phase" of proceedings as described on page 4 of the Francisco Lopez-Herrera affidavit of September 12, 1994 within two years, Plaintiff may thereafter re-institute suit in this court within six months; and

(6) Should a Venezuelan Court, for any reason, decline to exercise jurisdiction over this matter, Plaintiff may re-institute this action, in this Court, within six months.

A stipulation assenting to the above conditions may be filed with the Court within the next thirty days. Upon receipt, the Court will formally GRANT Defendant's motion and dismiss this action.

IT IS SO ORDERED, THIS THE 11 DAY OF FEBRUARY 2004

/s/ John R. Mather
John R. Mather
Judge, State Court Fulton County

THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

LIGIA PACHECO DE PEREZ, et al., Plaintiffs, v. AT&T COMPANY, et al., Defendants,	)	CIVIL ACTION FILE 95 VS 0104492
CRUZ SIGALA, et al., Plaintiffs v. AT&T COMPANY, et al, Defendants	)	CIVIL ACTION FILE 95 VS 0104493

ORDER

(Filed Mar. 18, 2004)

As Defendants have, by stipulation of March 12, 2004, assented to the conditions provided in this Court's Order of February 11, 2004, the Court hereby dismisses this action pursuant to the doctrine of forum non conveniens in favor of the Courts of Venezuela.

IT IS SO ORDERED, THIS THE 18th DAY OF MARCH 2004

/s/ John R. Mather
John R. Mather
Judge, State Court Fulton County

SUPREME COURT OF GEORGIA

Case No. S01 A0464 Atlanta, July 26, 2001

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

AT&T CORP., et al. v. CRUZ SIGALA et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Carley, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

Case No. S01A0465 Atlanta, July 26, 2001

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

AT&T CORP., et al. v. LIGIA PACHECO DE PEREZ et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Carley, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

274 Ga. 137, 549 S.E.2d 373

In the Supreme Court of Georgia

Decided: JUL 16 2001

S01A0464, AT&T CORPORATION et al. v. SIGALA et al.
S01A0465. AT&T CORPORATION et al. v. PEREZ et al.

FLETCHER, Chief Justice.

Cruz Sigala, Ligia Pacheco de Perez and other citizens of the Republic of Venezuela filed these wrongful death and personal injury actions against AT&T Corporation and its Atlanta employees as a result of a 1993 gas pipeline explosion in Venezuela. The defendants moved to dismiss on the basis of forum non conveniens, which the trial court denied due to the absence of statutory authority. We granted AT&T's petition for certiorari to consider whether a Georgia trial court has the inherent authority to dismiss a lawsuit that nonresident aliens bring for injuries occurring on foreign soil. Following the majority of states, we adopt the doctrine of forum non conveniens and hold that Georgia courts may exercise their inherent power and dismiss cases involving nonresident aliens when an adequate alternative forum exists and dismissal serves the interests of justice and convenience of the parties. Therefore, we reverse.

FACTS

A gas pipeline ruptured in Tejerias, Venezuela when a rotoexcavator machine struck the line while digging a trench for a fiber-optic telephone cable. The explosion and resulting fire killed 50 people and injured many others.

The Venezuelan plaintiffs filed ten other actions in the federal and state courts of California, Connecticut, Florida, Georgia, Illinois, and New Jersey. AT&T removed this action from the State Court of Fulton County to the U.S. District Court for the Northern District of Georgia, which denied the plaintiffs' motion to remand and granted AT&T's motion to dismiss based on the doctrine of forum non conveniens.[1] The U.S. Court of Appeals for the Eleventh Circuit reversed because of the lack of federal jurisdiction.[2]

On remand, the state court weighed the relevant factors identified in *Gulf Oil Corporation v. Gilbert*,[3] concluding that there was an adequate alternative forum and public and private interests supported dismissing the action in favor of the courts of Venezuela. Despite this conclusion, the state court denied AT&T's motion to dismiss because Georgia does not have a statute giving trial courts the discretion to decline to exercise jurisdiction under the doctrine of forum non conveniens. After the Court of Appeals for the State of Georgia denied AT&T's application for interlocutory appeal, we granted certiorari.

FORUM NON CONVENIENS

The common-law doctrine of forum non conveniens is an equitable principle by which "a court having jurisdiction may decline to exercise it on considerations of convenience,

---

[1] *See Pacheco de Perez v. AT&T Co.*, No. 1:95-cv-2749-FMH (N.D.Ga. May 31, 1996).

[2] *See Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir.1998).

[3] 330 U.S. 501 ((67 SC 839, 91 LE 1055) (1947).

efficiency, and justice."[4] Under federal case law, a district court has the discretion to dismiss a lawsuit when there is an adequate alternative forum in a foreign court and dismissal best serves the convenience of the parties and the ends of justice.[5] The U.S. Supreme Court has identified relevant public and private interests to be considered in determining whether the plaintiff's choice of forum should be honored.[6] The private interests include the relative ease of access to sources of proof, the relative availability of compulsory process to secure the attendance of witnesses, the cost of obtaining willing witnesses, the need to view the premises, the ability to enforce judgments, and other factors that make a trial expeditious and inexpensive.[7] When courts are required to adjudicate disputes that have little connection to the chosen forum, the public interest factors include issues involving court congestion, jury duty, and choice of law.

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court

---

[4] *Atlantic Coast Line R.R. Co. v. Pope*, 209 Ga. 187 (71 SE2d 243).

[5] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971). *See generally* 17 MOORE'S FEDERAL PRACTICE § 111.70-§ 111.95 (3d ed. 2001).

[6] *See Gulf Oil Corp.*, 330 U.S. at 508.

[7] *See id.*

> in some other forum untangle problems in conflict of laws, and in law foreign to itself.[8]

Since the enactment of federal statutes permitting transfers between federal judicial districts, the doctrine applies in federal courts primarily when the alternative forum is a foreign court.[9]

Even though the common-law doctrine originated in the state courts,[10] the vast majority of states now follow a standard similar to the federal rule.[11] These states permit their courts to refuse to exercise jurisdiction when the interests of justice and the convenience of the parties justify dismissal.[12] Most states have relied on their courts' inherent judicial power in adopting the doctrine, although

---

[8] *Id.*

[9] *See* 17 MOORE'S FEDERAL PRACTICE § 111.01.

[10] *See Gulf Oil*, 330 U.S. at 505 n.4.

[11] *See* Jacques E. Soiret, *The Foreign Defendant: Overview of Principles Governing Jurisdiction, Venue, Extraterritorial Service of Process and Extraterritorial Discovery in U.S. Courts*, 28 TORT & INS> L.J. 533, 562 (1993).

[12] *See, e.g., Picketts v. International Playtes, Inc.*, 576 A2d 518, 524 (Conn. 1990); *Kinney Sys. v. Continental Ins. Co.*, 674 So2d 86, 87 (Fla. 1996); *McClain v. Ill. Cent. Gulf R.R. Co.*, 520 NE2d 368, 372 (Ill. 1988); *Gonzales v. Atchison, Topeka & Santa* Fe *Ry. Co.*, 371 P2d 193, 196 (Kan. 1962); *Beaven v. McAnulty*, 980 SW2d 285 (Ky. 1998); *Johnson v. G.D. Searle & Co.*, 552 A2d 29, 30 (Md. 1989); *Missouri Pac. R.R. v. Tircuit*, 554 So2d 878 (Miss. 1989); *Gore v. United States Steel Corp.*, 104 A2d 670 (N.J. 1954); *Silver v. Great Am. Ins. Co.*, 278 NE2d 619,, 621 (N.Y. 1972); *Chambers v. Merrell-Dow Pharm.*, 519 NE2d 370, 371 (Ohio 1988); *Braten Apparel Corp. v. Bankers Trust Co.*, 259 SE2d 110, 113 (S.C. 1979); *Zurick v. Inman*, 426 SW2d 767, 768 (Tenn. 1968); *Norfold & W. Ry. Co. v. Tsapis*, 400 SE2d 239, 242 (W.Va. 1990).

a few states have enacted statutes with a forum non conveniens provision.[13]

ADOPTION OF FORUM NON CONVENIENS UNDER GEORGIA LAW

This Court has the inherent power "to maintain a court system capable of providing for the administration of justice in an orderly and efficient manner."[14] Like our sister states, we exercise our inherent power only when established methods do not address a situation[15] and courts are compelled to provide solutions that enable the litigative process to proceed smoothly.[16]

Relying on our inherent judicial power, we adopt the doctrine of forum non conveniens for use in lawsuits brought in our state courts by nonresident aliens who suffer injuries outside this country. First, we think trial courts should have the discretion to determine whether a tort action should remain on their dockets when it involves foreign plaintiffs. Unlike the previous cases where we have declined to apply the doctrine, this case does not involve a resident or citizen of Georgia or another state.[17]

---

[13] *See Chambers*, 519 NE2d at 372 n. 3 (listing 33 jurisdictions that had adopted the common-law rule through case law compared to six states that had enacted the doctrine by statute or rule as of 1988); *see* also OCGA § 19-9-47 (applying forum non conveniens doctrine as part of Uniform Child Custody Jurisdiction Act).

[14] *Garcia v. Miller*, 261 Ga. 531, 532 (408 SE2d 97) (1991).

[15] *See McCorkle v. Judges of Superior Court*, 260 Ga. 315, 317 n.1 (392 SE2d 707) (1990) (Hunt, J., concurring).

[16] *See State v. Buckner*, 527 SE2d 307 (N.C. 2000).

[17] *See Brown v. Seaboard Coast Line R.R. Co.*, 229 Ga. 481, 482 (192 SE2d 382) (1972) (privileges and immunities clause of U.S. Constitution prohibits Georgia courts from applying forum non conveniens doctrine

(Continued on following page)

Second, adoption of the doctrine permits our state courts to preserve their limited judicial resources to resolve controversies that have a reasonable connection to their jurisdiction. Third, adopting the doctrine places this state in line with both the federal courts and the majority of the states and thus discourages foreign plaintiffs from suing in Georgia courts to litigate their tort claims in an American court.[18] As the U.S. Supreme Court has noted, the courts in our country are attractive to foreign plaintiffs because most states offer strict liability, jury trials are available, discovery is more extensive, contingent attorney's fees are allowed, and losing parties are not taxed the costs of their opponents' attorney's fees.[19]

In adopting this doctrine, we reject the plaintiffs' argument that the Georgia statutes concerning the rights of aliens gives Venezuelan citizens an equal right of access to our state courts.[20] Neither the United States Constitution nor the Georgia Constitution guarantees the same protections to aliens living outside this country that it gives citizens and aliens living within the borders of the

---

to nonresident citizens of other states in cases under Federal Employers' Liability Act, which has a special venue provision); *see also Atlantic Coast Line R.R. Co. v. Wiggins*, 77 Ga. App. 756, 759-760 (49 SE2d 909) (1948) (refusing to apply doctrine to Georgia resident).

[18] *See Kinney*, 674 So2d at 87-89 ("Nothing in our law establishes a policy that Florida must be a courthouse for the world, nor that the taxpayers of the state must pay to resolve disputes utterly unconnected with this state's interests.").

[19] *See Pipe Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (102 SC 252, 70 LE2d 419) (1981).

[20] *See* OCGA § 1-2-10 (rights of citizens of other nations to sue); OCGA § 1-2-11 (rights of aliens generally).

United States.[21] The Supreme Court has explained that it is the alien's presence within the territorial jurisdiction of the United States that gives the judiciary the power to extend constitutional protections beyond citizens to aliens.[22] Given the importance of an alien's presence as a resident within this country to invoke the rights guaranteed to citizens, we conclude that OCGA §§ 1-2-10 and 1-2-11 apply to citizens of foreign countries who are residing within the United States and do not extend to nonresident aliens.

We also conclude that our recent decisions addressing the doctrine of forum non conveniens under the Uniform Child Custody Jurisdiction Act do not prevent us from exercising our inherent powers here.[23] Unlike the Venezuelan citizens who brought these actions, the parties in those cases had an unqualified right under our constitution or federal statutes to litigate their claims in the courts of this state.[24] Although specific statutes codifying the doctrine will prevail over the common law, the absence of a statute generally permitting dismissal based on forum non conveniens does not prohibit us from adopting the doctrine in

---

[21] *See Barge Wagener Constr. Co. v. Morales*, 263 Ga. 190, 192 (429 SE2d 671) (1993).

[22] *See Johnson v. Eisentrager*, 339 U.S. 763, 770 (70 SC 936, 94 LE2d 1255) (1950).

[23] *See Patterson v. Patterson*, 271 Ga. 306 (519 S.E.2d 438) (1999); *Holtsclaw v. Holtsclaw*, 269 Ga. 163 (496 SE2d 262) (1998).

[24] *See Early v. Early*, 269 Ga. 415 (499 SE2d 329) (1998) (federal statutes placed exclusive jurisdiction of a child support modification action in Georgia); *Holtsclaw*, 269 Ga. at 165 (constitution gives husband the right to litigate his divorce action in the county of his residence); *see also Patterson*, 271 Ga. at 308 (trial court must determine whether Georgia is inconvenient forum for resident husband in child custody action under OCGA § 19-9-47(a)).

this international tort action. Because the trial court found that it lacked the inherent power to dismiss these cases under the doctrine of forum non conveniens, we reverse.

Judgment reversed. All the Justices concur, except BENHAM and CARLEY, JJ., who dissent.

S01A0464. AT&T CORPORATION et al. v. SIGALA et al.
S01A0465. AT&T CORPORATION et al. v. PEREZ et al.

BENHAM, Justice, dissenting.

Despite this Court's holding in *McCorkle v. Judges of Superior Court of Chatham County*, 260 Ga. 315, 316 (392 SE2d 707) (1990), that "[t]he inherent power is not a sword but a shield," the majority opinion in this case uses that power to pare away the constitutional and statutory jurisdiction of Georgia trial courts and to cut off from access to our courts persons who are entitled by statute to sue and be sued in this State. Because I believe that adoption of the doctrine of forum non conveniens is not a proper subject for the exercise of the inherent power of Georgia courts, I must dissent.

The inherent power of the judiciary is conferred on it by the State, and "must be found in, and derived from the law of the land, and also be exercised in the mode and manner that the law prescribes. [Cit.]" *Grimmett v. Barnwell*, 184 Ga. 461(1) (192 SE 191) (1937). The "law of the land" from which the judiciary of this State derives its inherent powers is our Constitution, which "invests those officials charged with the duty of administering justice according to law with all necessary authority to efficiently and completely discharge those duties the performance of which is by the constitution committed to the judiciary,

and to maintain the dignity and independence of the courts." *Lovett v. Sandersville R. Co.*, 199 Ga. 238, 239 (33 SE2d 905) (1945).

In the past, those powers have been used by trial courts "to preserve and enforce order and compel obedience to its judgments and orders, to control the conduct of its officers and all other persons connected with the judicial proceedings before it and to inflict summary punishment for contempt upon any person failing and refusing to obey any lawful order of such court." *Jackson v. State*, 225 Ga. 553(4) (170 SE2d 281) (1969). Specifically, we have recognized that trial courts have the power to adopt case assignment methods (*Lumpkin v. Johnson*, 270 Ga. 392(1) (509 SE2d 621) (1998)); to appoint counsel to represent indigent defendants (*Sacandy v. Walther*, 262 Ga. 11 (1) (413 SE2d 727) (1992)); to close the courtroom during a trial (*Waller v. State*, 251 Ga. 124(4) (303 SE2d 437) (1983)); to punish for contempt (*Jackson v. State*, supra); to correct errors in records (*Chase v. Bartlett*, 176 Ga. 40 (2) (166 SE 832) (1932)); to replace lost records (*Teasley v. Nelson*, 164 Ga. 242, 247 (128 SE 72) (1927)); to amend and modify judgments during the term of rendition (*Chero-Cola Bottling Co. v. Southern Exp. Co.*, 150 Ga. 430, 434 (104 SE233) (1920)); to compel the attendance of parties and witnesses (*Reagan v. Powell*, 125 Ga. 89, 92 (53 S.E. 580) (1906)); and to adjourn from day to day *Cribb v. State*, 118 Ga. 316, 317 (45 SE 396) (1903).

Those uses of inherent powers comport with the holding in *Waldrip v. Head*, 272 Ga. 572 (1) (532 SE2d 380) (2000); "'A court uses its inherent power when constitutional provisions, statutes, or court rules fail to supply answers to problems or when courts find themselves compelled to provide solutions that enable the litigative

process to proceed smoothly.' [Cit.]" However, the use of inherent power recognized by the majority in this case does not fit within the framework set forth in *Waldrip* because there are constitutional and statutory provisions which supply all the answers needed in this case.

For the superior courts, jurisdiction is established by our Constitution: "The superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution." Art. 6, Sec. 1, Par. 4, Ga. Const. 1983. There is no provision otherwise in the Constitution that permits our superior courts to divest themselves of the jurisdiction granted them by the Constitution. In fact, this Court has held repeatedly and recently that the superior courts lack the power to give up the jurisdiction thus granted to them. "[T]he courts of Georgia have no inherent authority to decline to exercise the jurisdiction otherwise granted by our constitution. . . ." *Holtsclaw v. Holtsclaw*, 269 Ga. 163 (496 SE2d 262) (1998). "[T]he constitution has vested all the judicial power in the courts of the State, and . . . neither the Legislature nor a judge, nor the judges of a superior court have authority to limit or expand the jurisdiction and authority of a superior court." *Fulton County v. Woodside*, 222 Ga. 90, 100 (149 SE2d 140) (1966). *See also Patterson v. Patterson*, 271 Ga. 306(1) (519 SE2d 438) (1999); *Early v. Early*, 269 Ga. 415, 418 (499 SE2d 329) (1998). Because the Constitution establishes the jurisdiction of our superior courts and by its terms permits no exceptions to that jurisdiction other than by the Constitution itself (Art. 6, Sec. 1, Par. 4, Ga. Const. 1983), adoption of the doctrine of forum non conveniens by this Court and application of the doctrine by the superior courts is beyond the reach of the inherent powers of the courts.

For state courts, it is statutory law which puts their jurisdiction beyond the reach of the inherent power of the courts. The General Assembly is empowered by the Constitution to define the jurisdiction of the state courts (Ga. Const. 1983, Art. VI, Sec. III, Par. I), and has exercised that power in OCGA § 5-7-4. Since the inherent power of the courts is to be used in furtherance of "those duties the performance of which is by the constitution committed to the judiciary" (*Lovett v. Sandersville R. Co.*, supra), and since the Constitution assigns the duty of determining the scope of the state courts' jurisdiction to the legislative branch, not the judicial branch, it follows that the inherent power of the courts cannot be used to divest the state courts of the jurisdiction assigned them by the legislature.

Limiting the operation of the doctrine to cases brought by non-resident aliens does not bring the abrogation of the constitutional grant of jurisdiction within the scope of our inherent power. The constitutional and statutory grants of jurisdiction to the trial courts permit no exception not contained therein, and neither the Constitution nor OCGA § 5-7-4 contains an exception for non-resident aliens. Indeed, citizens of other countries are guaranteed access to our courts by OCGA §§ 1-2-10 & 1-2-11. Nothing in either of those code sections distinguishes between resident and non-resident aliens or authorizes the distinction drawn between those groups by the majority opinion. I believe that to do so here is inappropriate as a matter of policy. When this Court, in 1993, rejected an argument that a statute which relegated most non-residents to an inferior legal position was unconstitutional (*Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190 (429 SE2d 671) (1993)), the General Assembly struck that provision from the statute. Ga. Laws 1995, pp. 642, 648. When considering

the policy statement implicit in that legislative action together with the plain language of OCGA §§ 1-2-10 & 1-2-11, I find it unmistakable that a plaintiff's status as a non-resident alien does not warrant a change in the constitutionally and statutorily established jurisdiction of our trial courts.

Were the trial courts of this State to be given the authority to dismiss cases on the ground of forum non conveniens, the legislative branch of government is the more appropriate source of that authority. The General Assembly is better-equipped for conducting hearings and studies to determine whether, in fact, our courts are experiencing the congestion the majority cites as a reason for adopting the doctrine. Indeed, the General Assembly has considered legislation enacting the doctrine, but has chosen not to do so. Of course, as this Court unanimously held in *Hallisey v. Fort Howard Paper Co.*, 268 Ga. 57(2) (484 SE2d 653) (1997), the legislature's " . . . refusal to legislate in this regard does not open the door for the courts of this state to make law." That this Court is not properly prepared to make this decision is reflected in the lack of guidance given the trial courts in the majority opinion. Rather than establish guidelines based on a consideration of the current needs of our population and our judiciary, the majority has merely parroted a set of considerations mentioned by the U.S. Supreme Court more than 50 years ago. Our court system is not the same as the federal system, and if the trial courts are to be given the power to apply the doctrine of forum non conveniens, they should also be given guidelines for the use of the doctrine, guidelines specific to the courts of Georgia. Furthermore, the majority has mentioned the considerations stated by the U.S. Supreme Court, but has not sought to apply them

to this case. For instance, there are substantial questions in this case regarding the availability of an adequate forum in Venezuela and the involvement of the Georgia defendants in the project which resulted in the tragic deaths from which this case arises, but the majority does not address those issues at all.

The majority's hasty adoption of the doctrine of forum non conveniens deprives the bench and bar and all litigants who would use Georgia courts of the stability, predictability, and certainty that are the necessary hallmarks of an effective court system. Precedent has no value if it is ignored, as the majority has done with this Court's decisions in *Patterson v. Patterson*, 271 Ga. 306 (1) (519 SE2d 438) (1999), and *Holtsclaw v. Holtsclaw*, 269 Ga. 163 (496 SE2d 262) (1998). The bench and bar and those who make decisions regarding the commencement of litigation have been entitled to rely on the unequivocal statement in those cases that trial courts lack the inherent power to dismiss cases under the doctrine of forum non conveniens: "The courts of Georgia have no inherent authority to decline to exercise their jurisdiction . . ." *Patterson v. Patterson*, supra; "[T]he courts of Georgia have no inherent authority to decline to exercise the jurisdiction otherwise granted by our constitution . . ." *Holtsclaw v. Holtsclaw*, supra. Without disavowing or even acknowledging the absolute nature of the language in those decisions, the majority has deprived judges, lawyers, and litigants of that reliance by suggesting the holding applies only when the parties have an unqualified right to litigate in our courts, and by misconstruing OCGA §§ 1-2-10 & 1-2-11, as discussed above, to hold that Venezuelans do not have such a right of access.

In this Court's rush to adopt the doctrine of forum non conveniens, insufficient consideration has been given to the effects the ruling may have on the law and on business interests in Georgia. For instance, since the majority opinion labels the doctrine of forum non conveniens as an equitable principle, will all judgments applying or refusing to apply the doctrine now be appealable to this Court under its jurisdiction over equity cases? Another question that arises is what impact this decision will have on overseas business interests in Georgia and on the efforts of Georgia residents to conduct business internationally. Since the majority has ruled that non-resident aliens are not entitled to sue and be sued in our courts, will that not limit foreign investment in Georgia businesses and suggest to other countries that businesses related to this State should not be permitted to do business there since they cannot be brought into court in their own home state? These are the types of questions that are not answered by the majority and which, by their very nature, should be addressed by the legislature, not this Court.

One of the reasons stated in the majority opinion for jettisoning precedent and ignoring our Constitution's delineation of jurisdiction is that Georgia will now be ranked among the majority of U.S. jurisdictions with regard to this issue. There is, however, no particular virtue in joining the majority if the conditions that led to the majority's position do not prevail here. The majority opinion places us there without any apparent consideration for differences between the various states and their constitutions.

Finally, I cannot join the majority opinion because it has done exactly what this Court told the Court of Appeals in *Sapp v. Gem Line, Inc.*, 267 Ga. 438(4) (479 SE2d 712)

(1997), that it should not do: it has used the inherent power of the courts "in order to avoid the merits of [cases], and disregarded the statutory directive to . . . decide cases on the merits and avoid dismissals." Because I believe that the jurisdiction of the trial courts of this State is governed by our Constitution and by statute, and that the inherent powers of the courts do not extend to modifying or denying that which is so established, and because the majority opinion unwarrantedly abandons established precedent, ignores legislative prerogatives, provides no guidance, fails to consider the ramifications of its holding, and destroys predictability, certainty, and stability in the law, I must respectfully dissent to the judgment of the majority in this case.

I am authorized to state that Justice Carley joins this dissent.

SUPREME COURT OF GEORGIA

Atlanta January 28, 2000

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

C00C0057. AT&T CORPORATIOn et al. v. CRUZ SIGALA et al.

C00C0058. AT&T CORPORATION et al. v. LIGIA PACHECO DE PEREZ et al.

Upon consideration of the Petition for Certiorari to review the judgment of the Court of Appeals in this case, it is ordered that it be hereby granted.

It is further ordered that the application for appeal is hereby granted. Notice of Appeal directed to the Supreme Court should be filed in the trial court within 10 days from the date of this order, timely enumeration of errors and briefs to be filed in this Court after the record is docketed here. All the Justices concur.

The Court is particularly concerned with the following:

> *Does a Georgia trial court have the inherent authority to dismiss, under the doctrine of forum non conveniens, a lawsuit brought by nonresident aliens for injuries occurring on foreign soil?*

Court of Appeals Nos. A00I0392, A00I0393

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Chief Deputy Clerk

Court of Appeals

of the State of Georgia

Atlanta, September 02, 1999

The Court of Appeals hereby passes the following order:

APPLICATION NO. A99I0393

AT&T CORP., ET AL V. CRUZ SIGALA et al.

Upon consideration of the Application for Interlocutory Appeal, it is ordered that it be hereby DENIED.

71037

95VS0104493

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta Sep 2 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Court of Appeals

of the State of Georgia

Atlanta, September 02, 1999

The Court of Appeals hereby passes the following order:

APPLICATION NO. A99I0394

AT&T CORP., ET AL V. LIGIA PACHECO DE PEREZ et al.

Upon consideration of the Application for Interlocutory Appeal, it is ordered that it be hereby DENIED.

71037

95VS0104492

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta Sep 2 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

LIGIA PACHECO DE PEREZ, et. al., Plaintiffs, 5. AT&T COMPANY, et. al., Defendants.	)	CIVIL ACTION FILE NO. 95 VS 0104492
CRUZ SIGALA, et. al., Plaintiffs, 5. AT&T COMPANY, et. al., Defendants.	)	CIVIL ACTION FILE NO. 95 VS 0104493

ORDER

The above styled actions came regularly before this Court and were heard on Defendants' Motion To Dismiss on the Basis of Forum Non Conveniens and Motion for Protective Order. All parties were represented by counsel. After considering the entire record, the briefs of counsel and applicable law, the Court hereby issues the following order:

These cases arise from a gas pipeline explosion and fire which occurred on September 28, 1993, in Tejerias, Venezuela. The explosion, which caused the deaths of over fifty Venezuelan nationals, occurred during the installation of a fiber optic telephone cable when a trenching machine came in contact with the gas pipeline.

Plaintiffs originally brought the above styled cases in the State Court of Fulton County bet were subsequently removed by Defendants to the United States District Court for the Northern District of Georgia. Following removal to federal court, Judge F. Hull, on May 31, 1996, granted Defendants' motion to dismiss based upon the doctrine of forum non conveniens. Plaintiffs then appealed to the Eleventh Circuit Court of Appeals arguing that the cases were improperly removed from state court because the district court did not have subject matter jurisdiction. Deciding only the jurisdictional issue, the Eleventh Circuit reversed, finding removal improper, and returned both cases to Fulton County State Court. *Perez v. AT&T Company*, 139 F.3d 1368 (11th Cir. 1998). Defendants now move this Court to apply the doctrine of forum non conveniens to these actions and dismiss in favor of the courts of Venezuela.

1. Forum Non Conveniens

The doctrine of forum non conveniens refers to the discretionary power of the Court to decline jurisdiction when convenience of parties and the ends of justice would be better served if the action were tried in another forum. See *Gulf Oil Corp v. Gilbert,* 330 U.S. 501 (1947). This exercise of discretion, generally recognized as vested within the inherent power of the trial court, allows dismissal of an inconvenient action even though jurisdiction and venue are proper.

While the doctrine of forum non-conveniens was recognized federally by the United States Supreme Court in *Gulf Oil v. Gilbert,* 330 U.S. 501 (1946) and the concept has been adopted, almost universally, by our sister states,

Georgia has never explicitly sanctioned the doctrine. See *Smith v. Board of Regents of the University System of Georgia,* 165 Ga. App. 565 (1983). To the extent that a Georgia Court may decline to exercise jurisdiction otherwise granted by our constitution, it is by authority of statutory law and has not been recognized as within the inherent power of the Court. *Holtsclaw v. Holtsclaw,* 269 Ga. 163 (1998) citing *Gay v. Piggly Wiggly Southern,* 183 Ga. App. 175 (1987), *Smith v. Board of Regents of the University System of Georgia,* 165 Ga. App. 565 (1983).

The Georgia Constitution provides that "(n)o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." *The Constitution of Georgia,* Art. 1, § 1, ¶12. In defining the right of a non-citizen's access to Georgia courts the legislature enacted O.C.G.A. § 1-2-10, which states "The citizens of other states of the United States or of foreign states at peace with this state shall, by comity, be allowed the privilege of suing in the courts of this state and of giving evidence therein, as long as the same comity is extended in the courts of the other states to the citizens of this state;" and O.C.G.A. § 1-2-11(b), which provides, in relevant part, that "aliens who are subjects of governments at peace with the United States and this state, ... shall be entitled to all the rights of citizens of other states who are temporarily in this state . . . ."

While the issue of a Georgia court's authority to decline jurisdiction over a non-resident alien plaintiff and resident defendant has not been specifically addressed by our courts, the Georgia Constitution has been held to require that a Georgia court exercise jurisdiction in cases of a Georgia resident plaintiff, *Atl. Coast Line R.R. Co. v.*

Wiggins, 77 Ga. App. 756 (1984), and in cases brought in Georgia by a citizen of another state. *Brown v. Seaboard Coast Line R.R.* Co., 229 Ga. 481 (1972). Despite the absence of case law on the precise issue subjudice, the Court would act presumptuosly and in disregard of the constitutional and statutory provisions cited above if it were to agree with Defendants that this Court may decline to exercise jurisdiction in these circumstances. Given the present state of the law, the Court can only conclude that the authority of a Georgia court to dismiss a case is strictly circumscribed and where existent, created and governed by statute. Since no Georgia statutory provision permits this Court the discretion to decline to exercise jurisdiction in these circumstances, the motion of Defendants must be DENIED. (See 1999 Georgia Senate Bill 124, introduced, to create the doctrine of forum non-conveniens in Georgia, but not passed.)

However, were this Court able to exercise discretion under a forum non conveniens analysis, it would be the judgment of the Court that the public and private interest factors to be weighed under *Gilbert* support dismissing this action in favor of the Courts of Venezuela.

The necessary premise underlying the doctrine of forum non conveniens is the existence of another, more convenient, forum where the defendant is amenable to process. While the Courts of Venezuela allegedly suffer from systemic problems which render Georgia a more attractive forum, the Court is unwilling to make a categorical determination that the courts of foreign sovereign with a functioning civil law system are inadequate. Defendants are subject to process in Venezuela by virtue of their consent to the jurisdiction of Venezuelan courts and the Venezuelan system of justice, whatever its alleged faults,

stands as an alternative forum for adjudication of plaintiffs' claims.

If an adequate alternative forum does exist, the Court must then consider a non-exhaustive list of private and public factors which should weigh decidedly in favor of dismissal in order to justify disturbing a Plaintiffs choice of forum.

Among the private interest factors which are a part of a *Gilbert* analysis are (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the possibility of a view of the premises, if a view would be appropriate; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947).

For reasons related to this incident occurring in a foreign country, nearly all of the above private interest factors listed above are problematic for a Georgia Court. While witnesses employed locally by AT&T are subject to the subpoena power of the Court, Venezuelan witnesses who do not voluntarily appear are not. Documents not within the control of AT&T are likewise beyond the reach of the Court. Defendant AT&T is also prejudiced in that other Venezuelan entities who may bear some responsibility cannot be brought into this action and any right to contribution must be asserted in the Courts of Venezuela. Since the incident occurred in a Spanish speaking country, it is also to be expected that a considerable portion of the trial will require translation and will necessarily impair the jurors ability to judge credibility. The ability of the jurors to view the scene would be no better in Venezuela however since subsequent construction has repaired any

visible evidence of the explosion. With due deference shown to the Plaintiffs choice of forum, the Court finds consideration of the above private factors to strongly favor dismissal to Venezuela.

Public interest factors include (1) administrative difficulties flowing from court congestion; (2) the "local interest in having localized controversies decided at home" (3) the avoidance of unnecessary problems in the application of foreign law; and (4) the unfairness of burdening citizens in an unrelated forum with jury duty. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947).

The central question to be determined in considering the public interest factors relates to conservation of judicial resources; i.e. whether there exists a sufficient nexus between the forum and the case to justify the commitment of scarce Court time and capital. See *Pain v. United Technologies Corp.,* 637 F.2d 791. Because the citizens of Georgia have little connection to this incident, especially in comparison to that of the citizens of Venezuela, public interest factors which are decidedly in favor of dismissal.

Consistent with what would be the judgment of this Court, the four federal district court decisions which have considered a forum non conveniens analysis in this and related cases have uniformly determined, as does this Court, that the *Gilbert* factors favor dismissal. *Cortez v. AT&T,* United States District Court, South District of Florida, Case No.: 93-2329; *Armas v. AT&T,* United States District Court, Northern District of Georgia, Case No.: 1:95-CV-1430-FMH; *Duran v. AT&T,* United States District Court, Northern District of Georgia, Case No.: 1:95-CV-2447-GET; *Perez v. AT&T, Sigala v. AT&T,* United

States District Court, Northern District of Georgia, Case No.: 1:95-CV-2749-FMH.

In conclusion, Georgia law does not, at present, recognize generally the inherent power of the Court to dismiss a case based upon the doctrine of forum non conveniens and the Court is therefore without authority to do other than to DENY Defendants' Motion. However, were the Court able to exercise discretion under a forum non conveniens analysis, the Court would find this a proper case for application of the doctrine and would dismiss the case in favor of adjudication in Venezuela.

In view of the above ruling, Defendants' Motion for Protective Order is rendered MOOT.

SO ORDERED this the ___ day of July, 1999.

The Honorable John R. Mather
Judge State Court of Fulton County

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: September 18, 2006

John J. Cummings
CUMMINGS CUMMINGS & DUDENHEFER
416 Gravier Street
New Orleans, LA 7130

Case No. S06C1333

LIGIA PACHECO v. AT&T CORPORATION et al.
DE PEREZ et al.

COURT OF APPEALS CASE NO. A05A1919

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

_____

_____

_____

_____

Therese S. Barnes, Clerk

(2)

No. 06-836

IN THE

Supreme Court of the United States

LIGIA PACHECO DE PEREZ, *et al.*,

Petitioners,

v.

AT&T CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF IN OPPOSITION

WILLIAM N. WITHROW, JR.
Counsel of Record
NORMAN L. UNDERWOOD
LYNETTE EADDY SMITH
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Respondents

206795

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the petition.

The only corporate Respondent is AT&T Corp. AT&T Corp.'s parent company is AT&T, Inc., which holds 100% of the stock of AT&T Corp.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

SUMMARY OF REASONS TO DENY THE PETITION 1

COUNTERSTATMENT OF THE CASE 1

A. Petitioners' Claims. 1

B. Proceedings Below. 2

REASONS FOR DENYING THE PETITION 8

I. Petitioners have not met their burden of showing that this case is proper for the Court's consideration. 8

II. The federal claim presented in the petition was not addressed by or presented to the Georgia Supreme Court. 9

III. The petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review. 11

CONCLUSION 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Robertson, 520 U.S. 83 (1997) 9, 10

Atlantic Coast Lines v. Wiggins, 49 S.E.2d 909, 77 Ga. App. 756 (1948) 13

Atocha's Case, 8 Ct. Cl. 427 (1872), *mandamus denied*, 84 U.S. 439 (1873) 13

AT&T Corp. v. Sigala, 549 S.E.2d 373, 274 Ga. 137 (2001) 5, 6

Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974 (2d Cir. 1993) 13

Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 9

Cohran v. Carlin, 331 S.E.2d 523, 254 Ga. 580 (1985) 5, 6

Da Rocha v. Bell Helicopter Textron, Inc., 451 F. Supp.2d 1318 (S.D. Fla. 2006) 12

ESI, Inc. of Tenn. v. Westpoint Stevens, 562 S.E.2d 198, 254 Ga. App. 332 (2002) 6

Morales v. Ford Motor Co., 313 F. Supp.2d 672 (S.D. Tex. 2004) 12

Cited Authorities

	Page
Murray v. British Broadcasting Corp., 81 F.3d 287 (2nd Cir. 1996)	12
Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981)	4
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)	14
Wilkie v. State, 266 S.E.2d 289, 153 Ga. App. 609 (1980)	6
Yee v. City of Escondido, 503 U.S. 519 (1992)	9
Statutes:	
O.C.G.A. § 1-2-10	5, 6
O.C.G.A. § 1-2-11	5, 6
O.C.G.A. § 9-10-31.1	5
O.C.G.A. § 50-2-21	7, 8
Rule:	
Rule 14(i)(4) of the Supreme Court of the United States	8, 9

Cited Authorities

Page

Treaties:

Treaty of Friendship, Commerce and Navigation, Dec. 8, 1923, U.S.-Ger., 44 Stat. 2132, T.S. No. 725 (1923) 12

Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, Jan. 20, 1835, U.S.-Venez., 8 Stat. 466 (1836) ..... *passim*

Other Materials:

Robert R. Wilson, *Access-to-Court Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20 (1953) 11, 12

SUMMARY OF REASONS TO DENY THE PETITION

The federal question raised in the petition was never properly presented to or considered by the Georgia Supreme Court. For this reason alone, under this Court's well-established case law, the petition should be denied. In the alternative, the question raised in the petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review. Accordingly, for this additional reason, the petition should be denied.

COUNTERSTATMENT OF THE CASE

A. Petitioners' Claims.

This case arises out of a 1993 gas line explosion in Venezuela that occurred while fiber optic phone cable was being laid to update Venezuela's phone system. All of the Petitioners are Venezuelan residents. Every entity directly involved in the cable-laying project – the government-owned phone company, the owner of the gas line, the contractor laying the phone cable, and the subcontractor digging the trenches for the phone cable – is a Venezuelan entity that cannot be brought before any United States court. However, Respondent AT&T Corp. ("AT&T"), the indirect parent company of the Venezuelan contractor upgrading the phone system, is subject to suit in Georgia. For this reason, and this reason only, the 35 individual petitioners filed, in the State Court of Fulton County, Georgia, the two consolidated

[1] Because the Statement of facts set forth in the petition is incomplete and seriously misrepresents portions of the record, Respondents provide this Counterstatement setting forth the facts pertinent to the petition.

mass tort cases that are the subject of the petition. Petitioners brought their claims in Georgia despite the fact that all of their claims are governed by Venezuelan law and involve almost exclusively Venezuelan participants, Venezuelan witnesses, and Venezuelan-based evidence.

B. Proceedings Below.

This action has a long procedural history. [2] Petitioners filed their Complaints in the State Court of Fulton County, Georgia in September of 1995. Shortly thereafter, Respondents removed the actions to the United States District Court for the Northern District of Georgia and that court subsequently dismissed the consolidated action based upon the doctrine of *forum non conveniens.*

Petitioners appealed Respondents' removal and the district court's *forum non conveniens* dismissal to the Eleventh Circuit Court of Appeals. Addressing only the issue of whether the cases were properly removed, the Eleventh Circuit Court of Appeals found that the district court did not have subject matter jurisdiction over the cases, reversed the district court's dismissal of the cases, and instructed the district court to remand the cases to the State Court of Fulton

---

[2] In addition to the two consolidated cases at issue in the petition, ten other actions were brought in various state and federal jurisdictions within the United States by Venezuelan plaintiffs against AT&T and various individual defendants in connection with the gas line explosion in Venezuela. Four of these actions were dismissed on the basis of *forum non conveniens*, one was *sua sponte* dismissed for lack of subject matter jurisdiction, and five were dismissed voluntarily by the plaintiffs. The causes of action asserted in each of these cases were substantially the same as those asserted in the instant case.

County, Georgia. *Perez v. AT&T Company*, 139 F.3d 1368 (11th Cir. 1998).

After remand, Respondents filed in the state trial court a Motion to Dismiss on the Basis of *Forum Non Conveniens*. In an Order dated July 20, 1999 (Appendix to the Petition for a Writ of Certiorari ("Pet. App."), 34), the trial court found that, under a traditional *forum non conveniens* analysis, Respondents' Motion to Dismiss should be granted. However, the trial court denied Respondents' Motion to Dismiss because it concluded that it did not have the inherent authority to dismiss, on the basis of *forum non conveniens*, claims brought by nonresident aliens for injuries occurring on foreign soil. (Pet. App. 40.) The trial court certified that its Order denying Respondents' Motion to Dismiss was one of such importance to the case that immediate review should be had. Thereafter, Respondents applied to the Georgia Court of Appeals for an interlocutory appeal of the trial court's denial of their Motion to Dismiss. The Court of Appeals denied Respondents' application for an interlocutory appeal. (Pet. App. 32, 33.)

On January 28, 2000, the Georgia Supreme Court granted Respondents' Petition for a Writ of Certiorari and noted that the court was particularly concerned with the following issue:

> Does a Georgia trial court have the inherent authority to dismiss, under the doctrine of *forum non conveniens*, a lawsuit brought by nonresident aliens for injuries occurring on foreign soil?

(Pet. App. 30.) Respondents argued to the Georgia Supreme Court that the Georgia trial court did have the inherent

authority to dismiss Petitioners' claims under the doctrine of *forum non conveniens.* Specifically, Respondents argued (1) that no prior holding of the Georgia Supreme Court answered the question of whether Georgia's trial courts have the inherent authority to dismiss, under the doctrine of *forum non convenines*, a lawsuit brought by nonresident aliens for injuries occurring on foreign soil; and (2) that neither the Georgia Constitution nor any Georgia statute grants to nonresident aliens an unqualified right of access to Georgia's courts.

In responding to Respondents' arguments at the Georgia Supreme Court, Petitioners never argued that a holding by the Georgia Supreme Court that the trial court had the inherent authority to dismiss Petitioners' claims under the doctrine of *forum non conveniens* would contravene the Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, Jan. 20, 1835, U.S.-Venez., 8 Stat. 466 (1836) (the "1836 Treaty").[3] In fact,

---

[3] In fact, Petitioners never even made this argument to the trial court. Rather, Petitioners cited the 1836 Treaty in connection with a separate, distinct argument. Specifically, Petitioners argued to the trial court that, in any application of the *forum non conveniens* standard articulated by this Court in *Piper Aircraft Company v. Reyno*, 454 U.S. 235 (1981), the provisions of the 1836 Treaty precluded the court from affording less deference to Petitioners' choice of forum than to a domestic plaintiff's choice of forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (acknowledging, in the context of applying the *forum non conveniens* standard, that there is usually a strong presumption in favor of the plaintiff's choice of forum, but stating that the strength of the presumption is tempered when the plaintiff is a foreign national suing in the United States). Because the question presented in the petition was never raised in the trial court, the Georgia Supreme Court would

(Cont'd)

Petitioners never even cited the 1836 Treaty in their briefs filed in the Georgia Supreme Court. Rather, Petitioners argued only state law grounds for affirming the order of the trial court. Specifically, Respondents argued (1) that O.C.G.A. §§ 1-2-10 and 1-2-11 grant to Venezuelan citizens a right of access to Georgia's courts equal to that of any Georgia resident; and (2) prior Georgia case law prevents the Georgia Supreme Court from concluding that Georgia's trial courts have the inherent authority to dismiss an action on the basis of *forum non conveniens.*

After briefing and oral argument, the Georgia Supreme Court reversed the decision of the trial court and held that Georgia trial courts do have the inherent authority to dismiss, on the basis of *forum non conveniens*, claims brought by nonresident aliens for injuries occurring on foreign soil.[4] *AT&T Corp. v. Sigala*, 549 S.E.2d 373, 375, 274 Ga. 137, 137 (2001) (Pet. App. 15). Specifically, the Georgia Supreme Court rejected Petitioners' interpretation of Georgia law and

(Cont'd)

have found the issue waived and would have refused to consider the argument. *Cohran v. Carlin*, 331 S.E.2d 523, 254 Ga. 580 (1985) (argument not presented to trial court will not be considered on appeal).

[4] Notably, the holding of the Georgia Supreme Court that is the subject of the petition was quickly superseded by O.C.G.A. § 9-10-31.1, which was passed by the Georgia Legislature in 2005. Consequently, no movant in Georgia's trial courts would, today, base a *forum non conveniens* motion to dismiss on the Georgia Supreme Court's holding at issue in the petition. Rather, a movant would rely on O.C.G.A. § 9-10-31.1, which allows suits to be dismissed on the basis of *forum non conveniens* regardless of whether the suits are brought by individuals residing in Georgia, the United States, or elsewhere.

held (1) that O.C.G.A. §§ 1-2-10 and 1-2-11 do not apply to nonresident aliens; and (2) that the Georgia Supreme Court's prior decisions do not prevent the court from adopting the doctrine of *forum non conveniens* in this action. 549 S.E.2d at 377, 274 Ga. at 140 (Pet. App. 21-22.). Not surprisingly, the Georgia Supreme Court never mentioned in its order the 1836 Treaty, which was never cited by Petitioners. Petitioners moved the Georgia Supreme Court to reconsider the case, but that motion was denied.[5] (Pet. App. 13.)

---

[5] In their motion for reconsideration, Petitioners listed 12 separate reasons why the Georgia Supreme Court should reconsider its decision. The twelfth listed error is, "The Court's Opinion, which bases a plaintiff's right of access to Georgia's courts upon different categories of citizenship and places of residence, violates anti-discrimination and equal protection provisions of the U.S. Constitution and laws, the laws and treaties of the United States which provide to foreign litigants access to U.S. Courts, and the anti-discrimination and court access provisions of the Georgia Constitution and statutes. Therefore, reconsideration should be granted." Significantly, even in their motion for reconsideration, Petitioners failed to identify the 1836 Treaty to the Georgia Supreme Court, let alone convey to the court the substance of that treaty. Moreover, under Georgia law, such a passing reference to the "laws and treaties of the United States" did not properly present the question at issue in the petition to the Georgia Supreme Court. *Cohran v. Carlin*, 331 S.E.2d 523, 528, 254 Ga. 580, 586 (1985) (enumerations of error not supported by argument or citation of authority found abandoned); *Wilkie v. State*, 266 S.E.2d 289, 290, 153 Ga. App. 609, 609 (1980) (finding enumerations of error abandoned for failure to support the errors with argument or citation of authority); *ESI, Inc. of Tenn. v. Westpoint Stevens*, 562 S.E.2d 198, 200, 254 Ga. App. 332, 334-335 (2002) (argument raised for the first time in a motion to reconsider did not properly preserve an issue for appeal because, "[i]nherent in a motion for reconsideration is a request to the court to reconsider an issue previously raised and/or ruled on").

After the case returned to the state trial court, the trial court re-addressed whether Petitioners' claims should be dismissed on the basis of *forum non conveniens*. After additional briefing and oral argument, the trial court entered an order conditionally dismissing this action on the basis of *forum non conveniens* in favor of the courts of Venezuela. (Pet. App. 2.)[6]

Petitioners appealed the state trial court's conditional dismissal to the Georgia Court of Appeals, but that court affirmed the decision of the trial court without opinion. (Pet. App. 1.) The Georgia Supreme Court denied Petitioners' petition for a writ of certiorari, which sought review of the trial court's conditional dismissal. (Pet. App. 41.) Thereafter, Petitioners filed the instant petition.

At no time before or after the Georgia Supreme Court's July 16, 2001 Order did Petitioners ever argue, to either the trial court, the Georgia Court of Appeals, or the Georgia Supreme Court, that a holding that the state trial court had the inherent authority to dismiss Petitioners' claims for *forum non conveniens* would violate the 1836 Treaty.[7] Petitioners'

---

[6] The trial court's conditional dismissal of the case became final on March 18, 2004, after Respondents assented to the conditions provided in the trial court's February 11, 2004 conditional dismissal. (Pet. App. 12.)

[7] In 2005 Petitioners did argue for the first time to the Georgia Court of Appeals that O.C.G.A. § 50-2-21(b) violated the 1836 Treaty, and therefore that the trial court's conditional dismissal of the case for *forum non conveniens* should be reversed. However, as Respondents explained to the Georgia Court of Appeals, O.C.G.A. § 50-2-21 is irrelevant to this case. That statute grants to Georgia's

(Cont'd)

claim that the 1836 Treaty precludes the Georgia Supreme Court's 2001 Order appeared for the first time in their petition that is now before the Court.[8]

REASONS FOR DENYING THE PETITION

I. Petitioners have not met their burden of showing that this case is proper for the Court's consideration.

Rule 14 of this Court provides that if, as is the case here, review of a state-court judgment is sought, the petitioner must

(Cont'd)
trial courts the statutory authority to dismiss certain actions on the basis of *forum non conveniens*. However, the statute was passed after Petitioners filed this action in 2003 and applies only to cases filed after July 1, 2003, which this case was not. Moreover, neither the Georgia Supreme Court nor the trial court relied upon O.C.G.A. § 50-2-21(b) in their orders allowing this case to be dismissed for *forum non conveniens*. In affirming the trial court's conditional dismissal of the case without opinion, the Georgia Court of Appeals agreed with Respondents that § 50-2-21(b) has no application to this case and that, in any event, any argument that § 50-2-21(b) violated the 1836 Treaty was waived. (Pet.'s App. 1 (stating, "The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.").)

[8] The instant petition is not the first petition for a writ of certiorari that Petitioners have prepared in this case for filing in this Court. After the Georgia Supreme Court issued its 2001 Order, Petitioners prepared and attempted to file in this Court a petition for a writ of certiorari that was nearly identical to the petition currently pending before the Court. However, that petition was submitted late and was therefore dismissed. That late-filed 2001 petition did raise the question whether the Georgia Supreme Court's 2001 Order violated the 1836 Treaty. However, Petitioners never properly made this argument to any Georgia trial or appellate court.

demonstrate with particularity when and how the federal question was raised in the state court and when and how the question was passed on by the state court. In their petition, Petitioners do not even attempt to carry this burden. Petitioners do not specify when they allegedly raised in the state courts below the federal question presented in their petition, they do not specify the method by which they allegedly raised the federal question in the state courts below, nor do they specify how the state courts allegedly passed on the federal question. For this reason alone, the petition should be denied. Rule 14(i)(4) of the Supreme Court of the United States (stating that the petitioner's failure to "present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition").

II. The federal claim presented in the petition was not addressed by or presented to the Georgia Supreme Court.

With "very rare exceptions," *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), this Court adheres to the rule in reviewing state court judgments that it will not consider a petitioner's federal claim unless "it was either addressed by, or properly presented to, the state court that rendered the decision" that the Court is being asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). *See also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (stating that, when the highest state court has failed to pass upon a federal question, the Court will assume that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary).

In this case there can be no question that the Georgia Supreme Court did not have a fair opportunity to address the federal question presented in the petition. Petitioners never even cited the 1836 Treaty in their briefs before the Georgia Supreme Court, let alone argue that the 1836 Treaty prevented the court from holding that the Georgia trial court had the inherent authority to dismiss Petitioners' claims on the basis of *forum non conveniens*. Petitioners' arguments before the Georgia Supreme Court rested exclusively on their interpretation of Georgia statutory and case law. In addition, Petitioners cannot dispute that the Georgia Supreme Court did not rule upon the federal question raised in the petition. In fact, the 1836 Treaty is not even mentioned in the Georgia Supreme Court's opinion.

As this Court has repeatedly held, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). By refusing to consider federal claims that were not addressed or presented to the state courts, the Court affords "state courts 'an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes' that could obviate any challenges to state action in federal court." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 221-222 (1983)). Here, the Georgia Supreme Court had an undeniable interest in having the opportunity to determine in the first instance whether a ruling that the Georgia trial court did have the inherent authority to dismiss Petitioners' claims for *forum non convenines* would contravene the 1836 Treaty. As this Court has repeatedly recognized, the denial of that opportunity should lead the Court to deny the petition.

III. The petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review.

Even assuming the question presented in the petition was properly presented to and ruled upon by the Georgia Supreme Court (which it was not), the petition should, in any event, be denied. The question presented in the petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review.

The relevant provision of the 1836 Treaty between the United States and Venezuela limits the right of court access to those individuals:

> who may be ***in the territories*** subject to the jurisdiction of the one or the other, ***transient or dwelling therein***, leaving open and free to them the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives and citizens of the country ***in which they may be***.

Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela, Jan. 20, 1835, U.S.-Venez., art. 13, 8 Stat. 466, 472 (1836). The "transient or dwelling therein" language used in the 1836 Treaty was replicated in at least seventeen other treaties concluded between the United States and other countries between 1824 and 1923, of which only a handful remain in force. *See* Robert R. Wilson, *Access-to-Court Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20. 38 (1953).

The "transient or dwelling therein" language found in the 1836 Treaty limits court access to those aliens (unlike Petitioners) who are physically present in the United States. The language is in sharp contrast to provisions of later Friendship, Commerce and Navigation ("FCN") treaties, which unconditionally grant equal access to courts to "the nationals of each" country, irrespective of residence, domicile, or physical presence. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Dec. 8, 1923, U.S.-Ger., art. 1, 44 Stat. 2132, T.S. No. 725 (1923); *see also Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2nd Cir. 1996) (noting that the FCN treaty between the United States and Ireland provides for "national treatment with respect to ... having access to the courts of justice" and that, in contrast, the Berne Convention contains no such language); Wilson, *supra*, at 44-45 (collecting treaty citations).

The courts that have carefully construed the "transient or dwelling therein" limitation at issue in the 1836 Treaty have held the language not to permit (on their own authority, absent other treaty, statutory or common law authorization) equal access to courts for individuals who are not at least physically present in the United States at the time the suit is instituted. *See, e.g., Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp.2d 1318, 1323 (S.D. Fla. 2006) (("[The 1836 Treaty] plainly refers only to legal actions involving citizens of one signatory who are 'transient or dwelling in the territory of the other signatory.'"); *Morales v. Ford Motor Co.*, 313 F. Supp.2d 672, 686-87 (S.D. Tex. 2004) (construing identical language in a 1829 treaty with Brazil and concluding, "Nothing within this provision [the "transient or dwelling therein" language] suggests that [foreign] plaintiffs not located in the territory of the United States may

bring suit within the latter's courts for events that took place abroad on equal footing with citizens of the United States.").[9]

This interpretation by United States courts of the "transient or dwelling therein" language, which has its roots in a decision dating back over a hundred years, *see*, *e.g.*, *Atocha's Case*, 8 Ct. Cl. 427 (1872) (construing identical language of the 1831 treaty with Mexico and concluding that it applied only to "American citizens residing in Mexico" or Mexican citizens residing in the United States), *mandamus denied*, 84 U.S. 439 (1873), should be dispositive here.[10] The plain language of the 1836 Treaty limits its application to individuals physically present within the United States, and

---

[9] Petitioner's reliance on *Atlantic Coast Lines v. Wiggins*, 49 S.E.2d 909, 77 Ga. App. 756 (1948) at footnote 1 of the petition, is unavailing. That case does not concern the "transient or dwelling therein" language of the 1836 Treaty, but, rather, the analytically distinct concept of jurisdiction over transitory actions in tort. *Wiggins*, 49 S.E.2d at 911, 77 Ga. App. at 759.

[10] Although not cited by Petitioners, Respondents have identified one possible contrary ruling by the federal Circuit Courts of Appeal, *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993). In *Blanco*, the Second Circuit suggests that the 1836 Treaty between Venezuela and the United States might be applicable to a Venezuelan plaintiff not physically located in the United States. However, the Second Circuit's reference to the 1836 Treaty is arguably dicta and did not directly address the phrase "transient or dwelling therein" found in the 1836 Treaty. Moreover, the Second Circuit ultimately ruled that a *forum non conveniens* dismissal was nonetheless appropriate in circumstances comparable to those presented in this litigation. *See id.* at 981 (applying *Gilbert*'s private and public factors and holding that plaintiff's contacts with the American forum were tenuous and that an adequate remedy existed in Venezuela).

this Court has previously held that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectation of its signatories.'" *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 181 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963).)

In this case, it is undisputed that each of the petitioners is a non-resident alien. Because they are not physically present within the United States and were not physically present within the United States either at the time of their alleged injury or when this lawsuit was filed, the 1836 Treaty has no application to their case. The "transient or dwelling therein" language of the 1836 Treaty does not render the Georgia Supreme Court's opinion in violation of federal law and does not grant to Petitioners an unqualified right of access to Georgia's trial courts to try their claims for injuries allegedly incurred in Venezuela. For all these reasons, the petition presents no serious conflict in authorities and is not otherwise worthy of this Court's review.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

WILLIAM N. WITHROW, JR.
Counsel of Record
NORMAN L. UNDERWOOD
LYNETTE EADDY SMITH
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Respondents